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PUBLIC HOUSING CONSENT CLAUSES: UNCONSTITUTIONAL CONDITION OR CONSTITUTIONAL NECESSITY?

*JASON S. THALER**

INTRODUCTION

It is 8:00 a.m. in a Chicago public housing project. As some residents get ready to start their day, an uneasy feeling envelops them. A mother awakens her son, who slept in the bathtub for fear that bullets would crash through his window. In another apartment, an elderly woman counts her money to make sure she has enough to pay the "toll" that gang members charge to ride the elevator. Children who walk to school must maneuver around needles and crack vials while simultaneously avoiding random gunfire.

Maintenance workers in another building attempt to sneak into an apartment to install window guards. Last time they had to "pull out" after gang members told the superintendent to "get his white ass out of there." As he left, his car was sprayed with automatic gunfire. Other maintenance workers carry knives, wrenches, and golf clubs to protect themselves. In addition, residents often do not receive mail because the United States Postal Service refuses to deliver, out of fear for mail carriers' safety.

Such is the way of life, not only in Chicago, but in many public housing developments throughout the United States.[1] Crime and vandalism, long endemic in public housing, have been exacerbated significantly by increased drug abuse.[2] Drug gangs control the developments by "imposing a reign of terror" on public housing tenants.[3] Law enforcement officers are often reluctant to enter

* I am grateful to Professors Robert Cooper and Abner Greene of Fordham University School of Law for their encouragement and editorial support during the writing of this Note.

1. This account was taken from various articles describing life in Chicago public housing and other projects around the country. *See* Bettina Boxall, *Housing Project Is a Study in Contrasts*, L.A. Times, Sept. 19, 1989, § 2, at 1; Vincent Lane, *Public Housing Sweep Stakes*, Pol'y Rev., Summer 1994, at 68, 69; John Leo, *Sweeping Up the Projects*, U.S. News & World Rep., May 2, 1994, at 20; Rob Teir, *Tenants' Privacy Held Captive By Crime*, Nat'l L. J., May 9, 1994, at A21, A22; Camilo José Vergara, *Hell in a Very Tall Place*, The Atlantic Monthly, Sept. 1989, at 72, 78.

2. *See infra* note 37.

3. As part of the Anti-Drug Abuse Act of 1988, Congress passed the Public Housing Drug Elimination Program. Congress found that "drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants." Public Housing Drug Elimination Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4301, 4301-03 (codified as amended at 42 U.S.C. §§ 11901-11925 (Supp. V 1993)).

some developments because they too have become victims of violence.[4]

Today there are approximately 1.4 million units of public housing in the United States.[5] Although most public housing developments provide decent homes for residents,[6] an increasing number of projects have experienced such an increase in criminal activity that they are described as "war zones"[7] and "hell."[8] In Los Angeles, the housing police bitterly joke, "We own it; [the drug dealers] run it."[9]

On September 20, 1988, in response to increasing violent crime in one of Chicago's public housing developments, Vincent Lane, the Executive Director of the Chicago Housing Authority, instituted "Operation Clean Sweep."[10] In that operation, CHA officials and Chicago

4. For example, see Vicki Hyman, *Bullets Barely Miss Patrolling Deputy*, Times-Picayune, Sept. 2, 1994, at B2 (describing a sniper attack on a police officer in a New Orleans public housing project).

5. According to the Department of Housing and Urban Development's most recent figures, 1,360,000 units of public housing exist in the United States. 1992 HUD Ann. Rep. 62.

6. In 1989, Congress established the National Commission on Severely Distressed Housing and charged it with devising a National Action Plan to eradicate severely distressed public housing by the year 2000. Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, §§ 501-07, 103 Stat. 1987, 2048-52 (1989). The Commission defines "severely distressed public housing" as housing where at least one of the following factors is present: (1) families living in distress; (2) high rates of serious crimes in the development or surrounding neighborhood; (3) barriers to managing the environment; and (4) physical deterioration of buildings. *The Final Report of the National Commission on Severely Distressed Public Housing* B-2 to B-9 (1992) [hereinafter *The Final Report*]. The Commission's report, released in 1992, found that only six percent, or approximately 86,000 units, are severely distressed, but warns that if action is not taken, the number will increase. *Id.* at 2.

7. Thomas Moore et al., *Dead Zones*, U.S. News & World Rep., Apr. 10, 1989, at 20, 24.

8. Vergara, *supra* note 1, at 72.

9. Terence Dunworth & Aaron Saiger, Nat'l Inst. of Just., Drugs and Crime in Public Housing: A Three-City Analysis iii (Mar. 1994).

10. Operation Clean Sweep is officially entitled the Emergency Housing Inspection Program. It is a comprehensive, multistage program consisting of three phases. Phase I, the most widely publicized, entails securing the building and restoring common areas. This phase has 12 steps: (1) selecting the site to be swept; (2) gathering sweep participants at a central staging area; (3) securing perimeter of building by placing police at all entrances and exits; (4) notifying the CHA that perimeter is secured; (5) notifying the press that a sweep is under way; (6) opening an operation center to provide residents with information and to process work orders; (7) inspecting each unit; (8) replacing police with CHA security officers after inspections; (9) enclosing the lobby to control access; (10) instituting a guest policy and issuing identification cards to residents; (11) making the necessary building repairs identified during the inspections; and (12) assessing the residents' needs for services. Phase II entails improving property management. This includes administration management, designed to remove unlawful tenants and ensure compliance with housing policies by future residents, and maintenance management, designed to repair vacant units and reoccupy them as soon as possible. Phase III entails providing resident services. This involves identifying and offering aid to residents with problems such as unemployment, substance abuse, day care, and domestic violence. *Drugs in Federally Assisted*

police officers staged a military-like assault on one of the CHA's ravaged buildings. Upon arrival, police sealed off all building entrances and exits and secured the stairways, hallways, and other common areas. Then, both police and CHA officials conducted door-to-door searches for weapons, drugs, unauthorized residents, and unsafe or unsanitary conditions.[11]

HUD Secretary Jack Kemp praised Operation Clean Sweep as a "progressive" and "innovative" response to the crime problem in public housing.[12] While the sweeps did not eliminate the CHA's crime problem, there is evidence that the crime rate decreased following the sweeps.[13] As a result of its initial success, the operation has become a model for other cities facing similar problems in large public housing developments.[14]

Despite their popularity among beleaguered residents and housing officials, the sweeps raised constitutional questions concerning the Fourth Amendment, because they were conducted without warrants or probable cause.[15] The American Civil Liberties Union filed a complaint against the CHA on December 16, 1988, claiming that the sweeps were unreasonable, in violation of the Fourth Amendment.[16]

Housing: Hearing Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, July 20, 1989, at 103, 117-26 (testimony of Vincent Lane, Chairman, Chicago Housing Authority); Barbara Webster & Edward F. Connors, Nat'l Inst. of Just., The Police, Drugs, and Public Housing 2-3 (June 1992).

11. *See supra* note 10.

12. Jack Kemp, *Drug-Free Housing for the Nation's Poor*, Wash. Post, Apr. 17, 1989, at A19.

13. Between 1988 and 1991, the violent crime level in Chicago increased 31%, while in public housing the increase was 21%. Patrick T. Reardon, *Without Sweeps, CHA Crime Might Be Worse*, Chi. Trib., Oct. 26, 1992, at 1.

14. Robert Lee, *Proposal to 'Seal Off' Projects is Part of a National Trend*, Baltimore Sun, Jan. 16, 1991, at 6 (describing "sweep" or "secure" programs by public housing authorities in Philadelphia, Chicago, Newark, and Boston).

15. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment proscribes unreasonable searches and seizures. Searches conducted without a warrant issued upon probable cause are "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). Probable cause can be defined as whether a reasonable person can conclude from the facts and circumstances that a crime occurred or that evidence of a crime is located in a place to be searched. 1 John Wesley Hall, Jr., Search and Seizure § 3.8, at 82 (2d ed. 1991). The sweeps were problematic because they were conducted in response to random acts of crime, such as sniper fire, in which no person or persons were identified as suspects. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 795 (N.D. Ill. 1994).

16. Summeries v. Chicago Hous. Auth., No. 88-10566 (N.D. Ill. filed Dec. 16, 1988). The first and second allegations in the complaint were based upon a claim of

The CHA contended that the sweeps were conducted in response to emergency circumstances and were therefore constitutional.[17] In an effort to avoid lengthy litigation, the parties entered into a court-approved consent decree limiting the substance and breadth of the searches.[18]

The sweeps continued without incident for four years. On October 13, 1992, however, a seven-year old boy on his way to school was shot to death in a Chicago housing project by a sniper.[19] The crime outraged the community and the city of Chicago. Over the next several months, CHA officials and Chicago police officers conducted sweeps with renewed vigilance, ignoring many of the limits of the consent decree. Rather than conducting general housing inspections, as defined by the consent decree, the new round of sweeps were substantially more invasive than were the previous sweeps.[20] In response, the ACLU, on behalf of four tenants who opposed the sweeps, filed a class action suit against the CHA, resulting in the decision in *Pratt v. Chicago Housing Authority*.[21]

The Pratt *Decision*

In *Pratt*, United States District Judge Wayne Andersen issued a preliminary injunction against further sweeps.[22] He ruled that sweeps that were not conducted in accordance with the guidelines of the con-

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unreasonable search and seizure in violation of the Fourth Amendment. Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 Nw. U. L. Rev. 1103, 1105 n.14 (1992) (discussing the *Summeries* complaint).

17. The CHA claimed that the searches occurred in response to "exigent" circumstances. Exigency is one of the "few specifically established and well-delineated exceptions" to the warrant requirement. Katz v. United States, 389 U.S. 347, 357 (1967); *see* Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971).

Exigency refers to emergency circumstances posing an immediate threat to the lives of others. Warden v. Hayden, 387 U.S. 294, 298-99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."); Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (outlining standards for determining whether exigent circumstances justified entry into a home). When exigent circumstances exist, a warrant is not required to conduct a search. Hall, *supra* note 15, § 14:1, at 582.

18. Under the terms of the decree, the CHA can no longer search the person or personal effects of any individual. In addition, contents of property such as closets, drawers, medicine cabinets, boxes, or other containers are not to be searched. Finally, police officers may no longer act as an investigating party. Rather, police officers may only accompany CHA staff members who conduct the inspections. Yarosh, *supra* note 16, at 1105 (discussing terms of the consent decree).

19. Matthew Nickerson, *Sniper Kills Cabrini Kid Steps From School*, Chi. Trib., Oct. 14, 1992, at 1.

20. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 794 (N.D. Ill. 1994) (outlining the distinctions between searches conducted in accordance with consent decree guidelines, and the new round of sweeps).

21. 848 F. Supp. 792 (N.D. Ill. 1994).

22. The Court issued a preliminary injunction based on the likelihood that the sweeps would be ruled unconstitutional. *Id.* at 794.

sent decree violated the Fourth Amendment.[23] Judge Andersen reasoned that because the sweeps were ordered without probable cause, they were per se unreasonable.[24] Furthermore, he found that exigent circumstances did not exist at the time the searches were conducted.[25] Although the CHA was enjoined from conducting warrantless searches of tenants' apartments, the injunction did not prevent the CHA from conducting searches pursuant to valid search warrants or conducting warrantless searches in common areas and vacant apartments.[26] In addition, searches were allowed when a clear emergency existed and there was probable cause to believe a crime was committed.[27] Finally, searches were allowed if conducted pursuant to the oral or written consent of the residents or if they were consistent with the previous consent decree.[28]

Although the ACLU hailed the *Pratt* decision as a victory for civil rights, members of the CHA community were angry because they believed the sweeps were effective. A week after the *Pratt* decision, Judge Andersen was forced to decertify the class after receiving a petition with over 5,000 signatures from tenants who supported the sweeps.[29] Eighteen of the nineteen tenant councils in the CHA supported the sweeps.[30] Even those residents with reservations about the invasion of privacy stated that the searches were necessary "because a lot of innocent people [were] getting shot."[31] In addition, President Clinton criticized the decision, contrasting Fourth Amendment rights to be free from warrantless searches with "the right to go out to the playground; . . . to sit by an open window [or] go to school safely in the morning."[32] Immediately following Judge Andersen's ruling, the President instructed the Department of Housing and Urban Development and the Department of Justice to devise a constitutionally permissive strategy to protect residents in the nation's public housing

23. *Id.* at 797.

24. *Id.* at 795.

25. Judge Andersen found no exigent circumstances because the sweeps never took place within 48 hours after any gunfire. *Id.* at 795.

26. *Id.*at 797.

27. *Id.*

28. *Id.*

29. Pratt v. Chicago Housing Authority, 155 F.R.D. 177 (N.D. Ill. 1994). At one point in the *Pratt* decision, Judge Andersen noted how "many Americans . . . would not dream of allowing police to search their own homes [but] they support police sweeps of inner city neighborhoods." *Pratt*, 848 F. Supp. at 796. Apparently, Judge Andersen failed to realize that it was the *public housing residents* who supported the sweeps.

30. Leo, *supra* note 1, at 20. Presidents from 18 of the 19 Local Advisory Councils intervened in the *Pratt* case and contended that the sweeps did not violate the Fourth Amendment. *Pratt*, 848 F. Supp. at 793.

31. Robert Davis & Kevin Johnson, *In Projects, It's 'Pop' vs. Privacy*, USA Today, April 18, 1994, at 3A.

32. President's Radio Address, 30 Weekly Comp. Pres. Doc. 823 (April 16, 1994).

communities.[33] On April 16, 1994, pursuant to the President's instructions, the Administration announced a policy aimed at curbing crime in public housing.[34]

The Government's Five-Point Plan

In a press conference outlining the government's five-point plan, HUD Secretary Henry Cisneros spoke about the "eruption of violence" in Chicago's public housing projects.[35] In addition, he emphasized that the violence was not limited to Chicago.[36] As a result of widespread violence in public housing projects throughout the country,[37] the government's plan was formulated

33. *Id.*

34. Press Briefing by Secretary of Housing and Urban Development Henry Cisneros and Acting Associate Attorney General Bill Bryson, 1994 WL 130857 (White House) (Apr. 16, 1994)[hereinafter Press Briefing].

35. *Id.* at *1. In Chicago, in 1991, the citywide rate of violent crime was 32.5/1000, while in public housing it was 54/1000. Reardon, *supra* note 13.

36. Press Briefing, *supra* note 34, at *1.

37. While there is a lack of national data outlining the extent of drug and crime problems in public housing, Dunworth & Saiger, *supra* note 9, at 2, 70; *The Final Report*, *supra* note 6, at B-1 to B-2, available statistics confirm anecdotal reports that violence in public housing projects far exceeds that of the community at large. A study on crime in Los Angeles, Washington, D.C., and Phoenix public housing projects, revealed that between 1986 and 1989, the rates of violent offenses, per 1000 residents, greatly exceeded the rate of offenses citywide. Dunworth & Saiger, *supra* note 9. The rate of violent offenses in Los Angeles was 22/1000 compared with 67/1000 in the city's public housing developments. *Id.* at 37 fig. 4.2. In Phoenix, the rate was 9/1000 compared with 54/1000 in Phoenix public housing developments. *Id.* Finally, in Washington, D.C., the rate of violent offenses was 19/1000 compared with 41/1000 in public housing developments. *Id.*

This same study showed that the drug crime problem in these cities paralleled the violent crime problem. In Los Angeles, the number of arrests citywide for drug offenses was 16/1000, while in public housing it was 58/1000. *Id.* at 34 fig. 4.1. In Phoenix, the citywide rate was 5/1000, while in public housing it was 53/1000. *Id.* Finally, in Washington, D.C., the citywide rate was 24/1000, while in public housing it was 32/1000. *Id.* Although the authors of the study cautioned that this data alone made it impossible to determine if drugs and violence are causally related, they concluded that "[c]learly . . . both types of offenses occur at much greater rates in housing developments than elsewhere." *Id.* at 36.

Statistics from other cities similarly demonstrate that crime in public housing projects exceeds that in the community at large. In New Orleans, between 1989 and 1993, approximately 45% of the city's drug-related murders occurred in public housing developments. Jim Yardley, *Terror Stalks the Poor in New Orleans*, Atlanta J. & Const., Sept. 1, 1994, at A3. In New York, in 1994, the felony crime rate fell three times faster citywide than in public housing projects. Clifford Krauss, *Giuliani Says Police Merger Won't Hurt Housing Safety*, N.Y. Times, Sept. 20, 1994, at B3.

While these statistics are not comprehensive, they illustrate the conditions that affect many public housing tenants around the nation. Deplorable conditions and excessive crime have destroyed residents' quality of life. Housing officials' attempts to improve conditions often have been rendered useless by the control that drug dealers exert over public housing developments. In Bridgeport, Connecticut, for example, crime in one public housing project was so bad that all residents were moved out and the entire complex was closed. *Bridgeport Housing Project to Close, A Victim of Crime*, N.Y. Times, July 9, 1994, at 21.

so that it could be implemented by housing authorities nationwide.[38]

The plan essentially consists of five elements: (1) placing metal detectors at building entrances; (2) erecting fences around public housing projects; (3) conducting sweeps in "common areas" such as stairwells, vacant apartments, and hallways; (4) frisking suspicious looking individuals; and (5) urging tenants to sign consent forms that permit police searches for weapons without a warrant or probable cause.[39]

The fifth element of the plan is the most controversial because the Administration proposes to insert the consent forms as a clause in public housing leases.[40] Critics attacked the idea of requiring tenants to sign leases containing "consent clauses," because they contend that such clauses place low-income tenants "over a barrel" by suggesting that tenants must compromise their constitutional rights to obtain public housing benefits.[41] The objection is twofold: First, tenants are being "coerced" into signing the consent forms out of fear of losing their homes and therefore the consent is not voluntary and is thus invalid under the Fourth Amendment.[42] Second, even if the consent were valid, the government cannot force tenants to surrender constitutional rights to receive governmental benefits.[43]

When the government intrudes upon an individual's privacy, the debate is often emotional and heated. While residents welcome the use of consent clauses as a weapon against endless crime, civil libertarians accuse the government of treating public housing residents as second-class citizens.

Though the use of sweeps has been litigated, the constitutionality of consent clauses is still unresolved. In addition, the debate continues as to whether the government can make acceptance of the consent clause a prerequisite to receiving public housing benefits.

This Note contends that the government may constitutionally require consent to search as a prerequisite to obtaining residence in public housing projects. Part I examines the consent exception to the Fourth Amendment and then considers whether the consent required

38. Press Briefing, *supra* note 34, at *1.

39. *Id.* at *2-3.

40. For example, the Paterson Housing Authority amended their leases to include "consent clauses" allowing the sweeps so that administrators may enter apartments "without advance notice" in the event of a building-wide inspection. Jerry DeMarco, *The Newest Way to Fight Crime*, Bergen Rec., Dec. 7, 1994, at B2.

41. *See* Gwen Ifill, *Kemp Quarterbacks a Drug Fight*, Wash. Post, Mar. 22, 1989, at A17; Mitchell Locin & Jan Crawford, *Tenant Consent Likely For Sweeps*, Chi. Trib. Apr. 15, 1994, at 1, 8; Tracey Maclin, *Warrantless Sweeps Are an Erosion of Freedom*, Hous. Chron., Apr. 22, 1994, at 33; *Safety-For-Rights a Bad Trade*, Chi. Trib., Apr. 19, 1994, at 22.

42. *See* discussion *infra* part I.B.

43. *See* discussion *infra* part II.

by the nation's public housing authorities is voluntary in nature or the product of duress. Part II addresses the unconstitutional conditions doctrine, which posits that the government may not condition receipt of a public benefit on the waiver of a constitutional right. This part provides a brief history of the doctrine as well as a description of the leading views on the doctrine today. It argues that the doctrine is overly formalistic and concludes that the best way to analyze unconstitutional conditions problems is to weigh the constitutional right at issue against the justifications that the government offers for intruding upon that right. Accordingly, part III examines the Fourth Amendment rights of public housing tenants and the underlying justifications for using consent clauses. This Note concludes that the Constitution does not forbid the government from requiring public housing tenants to consent to searches and that the searches are a necessary tool in combating crime in public housing projects.

I. PUBLIC HOUSING LEASES AND THE CONSENT EXCEPTION TO THE FOURTH AMENDMENT

Under the Fourth Amendment, searches and seizures are presumptively unconstitutional if conducted without a warrant issued upon probable cause, "subject only to a few specifically established and well-delineated exceptions."[44] Consent is an exception to both the warrant and probable cause requirements of the Fourth Amendment.[45] Only consent that is freely and voluntarily given, however, is sufficient to satisfy the requirements of the Fourth Amendment.[46] Prior to 1973, courts applied two distinct theories to analyze the consent exception and determine whether consent was voluntary: waiver of a known right and voluntariness.[47] Under the waiver theory, consent only can be valid if the person is informed of his or her Fourth Amendment rights and of the constitutional right to withhold consent.[48] Under the voluntariness theory, determining the consent's validity involves examining all of the circumstances surrounding the consent to ensure the absence of coercion.[49] The distinction is important because under the latter theory, people can voluntarily consent to a search without being informed that they have a constitutional right to refuse.[50]

In 1973, in *Schneckloth v. Bustamonte*,[51] the Supreme Court resolved the question of what constitutes valid consent by endorsing the

44. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citing Katz v. United States, 389 U.S. 347, 357 (1967)).
45. *Schneckloth*, 412 U.S. at 219.
46. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).
47. Hall, *supra* note 15, § 8:5, at 386.
48. *Schneckloth*, 412 U.S. at 221-22.
49. *Id.* at 221.
50. Hall, *supra* note 15, § 8:5, at 386.
51. 412 U.S. 218 (1973).

voluntariness theory. In *Schneckloth*, a California police officer stopped an automobile after observing that one headlight and the license plate light were burned out.[52] Bustamonte was one of six men in the car, only one of whom was able to produce identification.[53] After one passenger claimed that the car belonged to his brother, the officer asked if he could search the vehicle.[54] The passenger gave consent to the officer and assisted in the search.[55] Eventually, the officer discovered three stolen checks under the rear seat.[56] After the trial court denied a motion to suppress, the checks were admitted into evidence, leading to Bustamonte's conviction for possessing a check with intent to defraud.[57]

The California Court of Appeal affirmed Bustamonte's conviction, applying the voluntariness theory.[58] The Ninth Circuit, on habeas corpus review, remanded the case,[59] applying the waiver theory of consent and holding that the state failed to demonstrate that the officer had informed Bustamonte of his right to withhold consent.[60] On appeal, the Supreme Court faced the issue of what the prosecution must prove[61] to demonstrate that consent is voluntary and therefore valid: (1) the person understood that his consent could be freely and effectively withheld or (2) that voluntariness can be shown by the circumstances surrounding the consent.[62] The Court agreed with the California courts, which had adopted the voluntariness theory of consent, and concluded:

> [T]he question of whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.[63]

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52. *Id.* at 220.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. California v. Bustamonte, 76 Cal. Rptr. 17 (Cal. Ct. App. 1969). The California Supreme Court denied further review. *Schneckloth*, 412 U.S. at 221 n.2.
59. Bustamonte v. Schneckloth, 448 F.2d 699, 701 (9th Cir. 1971) (reversing the denial of Bustamonte's original application for a writ of habeas corpus in federal district court). The report of the district court is unreported. *Schneckloth*, 412 U.S. at 221 n.2.
60. 448 F.2d at 701.
61. When the government seeks to sustain a search as consensual, the government has the burden of proof. Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").
62. *Schneckloth*, 412 U.S. at 223.
63. *Id.* at 227.

Thus, a court must examine the facts and circumstances of each case to determine if consent was coerced or voluntarily given. Under *Schneckloth*, a housing tenant need not be informed of the right to refuse to consent to searches, provided that the tenant consents voluntarily. To determine if a tenant's consent obtained through a consent clause is voluntary, the *Schneckloth* test requires a court to examine the circumstances surrounding the tenant's signing of a lease containing the consent clause. Because a public housing lease is a contract between the public housing authority and the tenant,[64] contract law provides the proper framework in which to examine (1) whether a person can waive constitutional rights through contract and (2) whether the abdication of Fourth Amendment rights in a public housing lease is voluntary.

A. *Contracts and Constitutional Rights*

An initial question involves whether a person can contract to forfeit constitutional rights. There are two distinct views. The first treats constitutional rights as analogous to labor or other services and favors free exchange in the marketplace.[65] This position is based on the assumption that individuals are free to judge the worth of their constitutional rights,[66] and because they can invoke or waive these rights at will, they should also be able to sell them.[67] The second view posits that constitutional rights are inalienable and thus cannot be transferred or sold.[68] This position is generally derived from paternalistic theories that force citizens to retain their constitutional rights for their own good, regardless of the value individuals may assign to them.[69]

Depending upon the right in question, the Supreme Court has espoused both views. While some constitutional rights are unquestiona-

64. Because a lease transfers a possessory interest in land, it is commonly thought of as a conveyance. While this is true in some respects, there has been a shift by courts in the last several decades. Courts now emphasize the contractual nature of the lease and shape the law of leases using contract principles. *See* Roger A. Cunningham et al., The Law of Property § 6.10, at 258-60 (2d ed. 1993); Jesse Dukeminier & James E. Krier, Property 438-39 (3d ed. 1993).

65. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309, 346-47 (1982) ("If people can obtain benefits from selling their rights, why should they be prevented from doing so?").

66. *Id.*

67. *Id.*

68. An example of this view is an argument by Justice Douglas that the government should not be allowed "to 'buy up' rights guaranteed by the Constitution." Wyman v. James, 400 U.S. 309, 328 (1971) (Douglas, J., dissenting); *see also* Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights.").

69. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1480-81 (1989) (describing theories of paternalism).

bly inalienable,[70] the Court has affirmed that a person may contract away others. For example, in *Snepp v. United States*,[71] the Supreme Court rejected a First Amendment argument and held that a former CIA agent breached his employment contract with the government by failing to submit a manuscript of a book for Agency approval.[72] As an express condition of his employment with the CIA, Snepp had "pledged not to divulge *classified* information and not to publish *any* information without prepublication clearance."[73] Snepp claimed that the contract was unenforceable as a prior restraint on protected speech because the agreement included non-classified information.[74] The Court rejected this argument and observed that "[w]hen Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency."[75]

Snepp thus supports the proposition that when one voluntarily enters into a contract, the terms may include surrender of a constitutional right. *Snepp* is distinguishable from cases involving consent clauses, however, because *Snepp* did not involve criminal prosecution. In *Snepp*, the only risk associated with surrendering a First Amendment right was the inability to publish a book without prior approval. Public housing tenants who surrender a Fourth Amendment right, however, face a much greater risk—criminal prosecution.[76] Even if

70. *See* Bailey v. Alabama, 219 U.S. 219, 243-44 (1911) (prohibiting employees from contracting away Thirteenth Amendment rights through an employment agreement). Rights generally thought to be inalienable are those that are relational; rights that keep the moral fabric of society together. Individuals should not be able to relinquish these types of rights. They include the right not to be a slave, the right to be free from cruel and unusual punishment, and the right to life. Diana T. Meyers, Inalienable Rights: A Defense 53 (1985) (urging that certain rights cannot be "renounced conscientiously").

71. 444 U.S. 507 (1980) (per curiam).

72. *Id.* at 510.

73. *Id.* at 508 (emphasis in original).

74. *Id.* at 509 n.3.

75. *Id.*

76. In a case involving home searches and the Fourth Amendment, the Supreme Court found no constitutional violation. In Wyman v. James, 400 U.S. 309 (1971), the Court addressed the issue of whether the government could condition the receipt of welfare benefits on the recipient's submission to warrantless searches of her home. *Id.* at 310. In *Wyman*, New York statutes prescribed as a condition of receiving Aid to Families with Dependent Children, periodic home visits by caseworkers. *Id.* at 312. The Court noted that the only penalty for refusing to allow a visit was that "aid . . . merely ceases." *Id.* at 318. The Court noted two main purposes for the visits: assisting in the rehabilitation of the parent recipient and ensuring that the needs of the dependent child were being met. *Id.* at 317-19. Based on these important purposes, the Court concluded that the home visit was not unreasonable and therefore did not constitute a search within the meaning of the Fourth Amendment. *Id.* at 317.

Importantly, the Court distinguished cases in which the result of the search was criminal prosecution. *Id.* at 325. In *Wyman*, the Court emphasized that the recipient

the result of such intrusion would be prosecution, however, a person may contract away his right to be free from some warrantless governmental intrusions. The Court recognized this freedom in *Zap v. United States*.[77]

Zap was a contractor doing work for the Navy. His contract with the Navy included a provision that authorized the government to audit his records.[78] After the government conducted an inspection of Zap's records, they confiscated a check as evidence of a fraudulent claim that violated federal law.[79] After his conviction, Zap moved to have the check stricken as evidence, on the ground that it was illegally obtained.[80] The Court stated that the "law of searches and seizures . . . is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived."[81] When Zap, "in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had."[82] As *Snepp* and *Zap* indicate, an individual may voluntarily enter into an agreement, the terms of which may include surrender of a constitutional right, regardless of whether the abdication of such right may result in prosecution.[83]

B. *Voluntary Consent*

Although it is possible to contract away certain constitutional rights, the agreement must be voluntary. Courts routinely hold that an agreement is voluntary unless it is the product of duress.[84] The first

"is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted." *Id.*

Although *Wyman* is persuasive because of the similarity between welfare benefits and public housing benefits, it is distinguishable from cases involving consent clauses because there was no risk of criminal prosecution in *Wyman*.

77. 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). Although the indictment in *Zap v. United States* was dismissed, the case is still cited as authority in Fourth Amendment consent cases. *See* Texas v. Brown, 460 U.S. 730, 736 (1983); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); National Treasury Employees Union v. Von Raab, 808 F.2d 1057, 1062 (5th Cir. 1987); United States v. Picariello, 568 F.2d 222, 225 (5th Cir. 1978); United States v. Teeven, 745 F. Supp. 220, 234-35 (D. Del. 1990); Fowler v. N.Y. City Dep't of Sanitation, 704 F. Supp. 1264, 1271 n.5 (S.D.N.Y. 1989).

78. *Id.* at 626-27.

79. *Id.* at 627-28.

80. *Id.* at 628.

81. *Id.*

82. *Id.*

83. In the criminal context, defendants often waive constitutional rights. *See* North Carolina v. Butler, 441 U.S. 369, 375-76 (1979) (waiving rights against self-incrimination); Corbitt v. New Jersey, 439 U.S. 212, 219 (1978) (observing that "the [government] may encourage pleas by offering . . . benefits in return for the plea").

84. *See* Shaheen v. B.F. Goodrich Co., 873 F.2d 105, 107 (6th Cir. 1989); Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1009 (3d Cir. 1980); Bank IV Salina, N.A. v. Aetna Casualty & Surety, Co., 810 F. Supp. 1196, 1204 (D. Kan.

part of this section discusses whether public housing residents are being subjected to duress when they are presented with a lease containing a consent clause. The second part examines whether a lease containing a consent clause is unconscionable and therefore invalid.

1. Duress

One of the central arguments against the use of consent clauses in public housing leases is that the resulting agreement is the product of duress. Duress can be defined in various ways.[85] First, it implies a threat of violence that forces a person to sign a contract.[86] Under such circumstances, the resulting contract would not be valid because it was not entered into willingly. Duress also may be present when a party threatens nonperformance in an effort to modify the terms of the existing contract.[87] In yet another form, duress is a synonym for fraud, as where an illiterate person is induced to sign a contract that has unfavorable terms that are not explained to him.[88] In addition, critics argue that tenants are under duress when they have no choice but to sign the lease containing the consent clause because they cannot move elsewhere.[89]

Despite the abundance of low-income housing programs,[90] some low-income households still encounter difficulty in obtaining afforda-

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1992); Mid-State Electric, Inc. v. H.L. Libby Co., 787 F. Supp. 494, 497 (W.D. Pa. 1992). Normally, contracts that are the product of duress are either voidable at the election of the coerced party or altogether void if the situation involves the absence of consent rather than coerced consent. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-8, at 349 (3d ed. 1987).

85. Calamari & Perillo, *supra* note 84, at 336-39; Richard A. Posner, *Economic Analysis of Law* § 4.7, at 113-17 (4th ed. 1992).

86. Posner, *supra* note 85, at 113.

87. *Id.*

88. *Id.* at 113-14.

89. *See* Locin & Crawford, *supra* note 41, at 8.

90. Since 1973, the government has enacted legislation to increase the variety of programs that deliver housing assistance. Two programs initiated by the government in 1974 are the Section 8 New Construction and Substantial Rehabilitation Program, in which the government subsidizes the rents of tenants who live in new or substantially renovated structures owned by private developers, Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 8(b)(2), 88 Stat. 633, 663 (codified at 42 U.S.C. § 1437f (1988)), and the Section 8 Existing Certificate Program, in which the government issues participating residents certificates, enabling them to rent homes from any private landlord whose housing meets federal requirements. *Id.* (codified at 42 U.S.C. § 1437j (1988)).

Other initiatives include the Low Income Housing Tax Credit Program, I.R.C. § 42 (1992), programs that subsidize the interest rate that developers pay on loans used to acquire or build low income housing, Housing Act of 1961, Pub. L. No. 87-70, § 101(a), 75 Stat. 149 (codified at 12 U.S.C. § 1715*l* (1988)), and programs that distribute funds to local governments to subsidize construction and renovation by private developers. HOME Investment Partnerships Act, Pub. L. No. 101-625, §§ 201-226, 104 Stat. 4094, 4094-114 (codified at 42 U.S.C. §§ 12721-12756 (Supp. V 1993)). Finally, recently-enacted legislation aims to facilitate the sale of public housing units to tenants. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625,

ble housing other than in public housing projects. Popular programs such as Section 8,[91] which has assumed much of the responsibility of housing low-income households, are not available to many residents.[92] In addition, a majority of public housing residents are non-white and often face discrimination in the housing market.[93] Many public housing households are single-headed or are occupied by elderly people who may have difficulty relocating.[94] Finally, because the median income of public housing households is $6571,[95] subsidies and vouchers may not provide adequate assistance for those residents who want to move out of public housing.

Despite claims that public housing tenants cannot move elsewhere, they do have choices. Public housing should be distinguished from other forms of federally supported housing assistance because it is only one of several programs sponsored by the federal government to assist low-income households.[96] Present low-income housing assistance employs a mixed system of public and private ownership. The federal government has subsidized the construction of approximately 1.4 million public housing units owned and operated by the public sector.[97] An even larger number of households are assisted by federal rent subsidies and vouchers that supplement the rent paid by tenants for housing owned by private developers.[98]

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§ 411, 104 Stat. 4079, 4148 (1990) (codified as amended at 42 U.S.C. § 1437aaa-1437aaa8 (Supp. V 1993)). *See also* Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 Cornell L. Rev. 878, 899 (1990) (describing alternative housing programs).

91. *See supra* note 90.

92. Because the Section 8 program involves private developers, the program is only successful to the extent that private developers participate in it. In addition, reductions in HUD funding translate into fewer certificates and vouchers available for low-income households. Finally, households attempting to enter Section 8 housing face long waiting lists. For a discussion of problems concerning Section 8, see Deborah Kenn, *Fighting the Housing Crisis With Underachieving Programs: The Problem With Section 8*, 44 J. Urb. & Contemp. L. 77, 77-82 (1993).

93. Connie H. Casey, Office of Pol'y Dev. & Res., *Characteristics of HUD-Assisted Renters and Their Units in 1989* 5 (1992); *see* House Judiciary Comm., Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong., 2d Sess. 1, 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176; James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 Vand. L. Rev. 1049, 1052-60 (1989) (discussing housing discrimination against minorities).

94. Approximately 47% of households in public housing are headed by one person, Casey, *supra* note 93, at 7, and 38% of public housing residents are elderly. *Id.* at 5.

95. *Id.* at 10.

96. *See supra* note 90.

97. *See supra* note 5.

98. According to the Department of Housing and Urban Development's most recent figures, 4,070,000 households receive assistance from HUD. Of that number, 1,360,000 households are in public housing, 1,060,000 households participate in the Section 8 certificate or voucher program, and 1,650,000 households are living in private units subsidized by HUD programs. Thus, roughly 33% of households receiving HUD assistance live in public housing while 66% receive other federal assistance. 1992 HUD Ann. Rep. 62.

While it is true that some public housing residents cannot move elsewhere, this does not necessarily indicate that they are under duress. A defense of duress is only available to public housing tenants who can show that they would not have entered into the agreement absent some coercive behavior by the public housing authority.[99] Placing a consent clause in a public housing lease is not a coercive act that limits a tenant's choice. Accordingly, the argument that tenants are being subjected to duress because they lack choices is unpersuasive.

Because a contract between a large entity and an ordinary individual can be coercive—especially when the individual is poor[100]— critics also argue that the inequality of bargaining power between the public housing authority and tenants indicates that tenants are being subjected to duress.[101] This is characterized as "economic duress" and renders a contract voidable where "undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making the agreement."[102] To prove economic duress, however, the claim must be based on affirmative acts of a contracting party and "not merely on the necessities of the purported victim."[103]

Placing the consent clause within a lease is not an affirmative act constituting duress because it does not affect the bargaining position of the tenants.[104] The impoverished circumstances and subsequent inequality of bargaining power of public housing tenants are not sufficient to render an agreement voidable.

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99. *See* Gustin v. FDIC, 835 F. Supp. 503, 508 (W.D. Mo. 1993); Evans v. Waldorf-Astoria, Co., 827 F. Supp. 911, 913 (E.D.N.Y. 1993), *aff'd*, 33 F.3d 49 (2d Cir. 1994); FDIC v. Meyer, 755 F. Supp. 10, 13 (D.D.C. 1991); Robert E. Scott & Douglas L. Leslie, Contract Law and Theory 433 (2d ed. 1993).

100. The assumption is often based on the use of standardized forms and a gross disparity in bargaining power. Posner, *supra* note 85, at 114.

101. *See* Maclin, *supra* note 41, at 33.

102. Chouinard v. Chouinard, 568 F.2d 430, 434 (5th Cir. 1978); *see* Resolution Trust Corp. v. Ruggiero, 977 F.2d 309, 313-14 (7th Cir. 1992); Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 469 (9th Cir. 1987); Texas Commerce Bank, N.A. v. United Sav. Ass'n of Texas, 789 F. Supp. 848, 853-54 (S.D. Tex. 1992); Cochran v. Ernst & Young, 758 F. Supp. 1548, 1556-57 (E.D. Mich. 1991).

103. *Chouinard*, 568 F.2d at 434. *See also* Business Incentives Co. v. Sony. Corp. of Am., 397 F. Supp. 63, 69 (S.D.N.Y. 1975) ("The alleged duress must be proven to have been the result of defendant's conduct and not of the plaintiff's own necessities."); *Ruggiero*, 977 F.2d at 314 ("Moreover, the mere fact that one is in a difficult bargaining position due to desperate financial circumstances does not support a defense of economic duress."); *Sheehan*, 812 F.2d at 469 ("While we recognize the court's role in protecting persons from economic exploitation, we also note the importance of the notion of freedom of contract . . . ."); *Texas Commerce Bank, N.A.*, 789 F. Supp. at 853-54 ("When circumstances present a person with a series of alternatives, all of which are bad, the choice of the least bad is not duress."); *Cochran*, 758 F. Supp. at 1556-57 ("To maintain a claim of economic duress or coercion . . . serious financial harm must be threatened, and the person allegedly applying the coercion must act unlawfully.").

104. *See* Calamari & Perillo, *supra* note 84, at 337 ("[T]he general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress.").

Unquestionably, the government assumes a stronger bargaining position in negotiations with a public housing tenant. In any bargaining relationship, however, there may be some element of duress.[105] The presence of limited choices and unequal bargaining power, by themselves, however, do not constitute duress. If public housing tenants were able to void agreements because of limited choices and unequal bargaining power, then *any* lease signed by them would be unenforceable. This result supports the proposition that a person can avoid contractual obligations simply because of his or her impoverished circumstances. This is inconsistent, however, with accepted principles of contract law.[106]

2. Unconscionability

Critics also argue that leases containing consent clauses are unconscionable. A contract is unconscionable if its terms are so one-sided as to oppress or unfairly surprise a contracting party.[107] Courts often use the doctrine to deny enforcement of agreements whose procedural defects do not rise to the level of actionable duress.[108] The unconscionability doctrine has become a standard part of contract law and is incorporated in the Uniform Commercial Code[109] and the Restatement of Contracts.[110] The official comment to U.C.C. § 2-302 states, "The basic test is whether . . . the clauses involved are so one-sided as to be unconscionable . . . ."[111]

Generally, courts have defined unconscionability as either "procedural" or "substantive."[112] Procedural unconscionability refers to a defect in the bargaining process[113] and usually involves a practice that reduces an individual's ability to make a rational choice,[114] e.g., "Just

105. *See* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum. L. Rev. 603, 603-04 (1943).

106. *See* Scott & Leslie, *supra* note 99, at 433.

107. Black's Law Dictionary 1524 (6th ed. 1990).

108. *See* Scott & Leslie, *supra* note 99, at 499.

109. U.C.C. § 2-302 (1987). In its entirety, the section reads:

> (1) If a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

110. Restatement (Second) of Contracts § 208 (1981) [hereinafter Restatement]. The language of the Restatement is similar to the language of U.C.C. § 2-302(1).

111. U.C.C. § 2-302 cmt. 1 (1987).

112. Arthur Leff first made the distinction between procedural and substantive unconscionability. Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 486-87 (1967).

113. *Id.*

114. *Id.*

sign here; don't worry about the small print on the back."[115] Substantive unconscionability refers to the terms of the agreement itself and often concerns an unreasonable price or contract term,[116] e.g., "I have the right to cut off one of your child's fingers for each day you are in default."[117] The Restatement indicates that a contract can be unconscionable even if neither element is present.[118]

Critics charge that the use of form leases by public housing authorities is procedurally unconscionable. Because form leases are standardized documents consisting of pre-drafted terms, they offer tenants little or no opportunity for negotiation.[119] Thus, an inherent danger of standardized contracts is that they may be used by an enterprise having such disproportionately strong economic power that it may simply dictate, rather than propose, the terms of the contract.[120]

These types of documents are often called *adhesion contracts* because the only alternative to complete adherence is outright rejection of the terms.[121] Public housing leases with consent clauses may be considered adhesion contracts because public housing tenants have no opportunity to negotiate the terms of the agreement.

Notwithstanding the potential difficulties with form leases, they provide a benefit to both public housing authorities and tenants. They allow the landlord to avoid the costs of negotiating and drafting a separate lease with each tenant,[122] which reduces administrative costs that would normally be passed on in the form of higher rent. In addition, a judicial interpretation of one standard lease serves as an interpretation of similar leases.[123] This allows for a better calculation of risks by the parties as well as uniformity in court decisions.[124] These advantages have led to the widespread use of standardized contracts in many routine business transactions.[125] As a result, courts are increasingly willing to enforce such contracts.[126]

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115. James J. White & Robert S. Summers, Handbook of the Law Under the Uniform Commercial Code 151 (2d ed. 1980).

116. Scott & Leslie, *supra* note 99, at 56.

117. White & Summers, *supra* note 115, at 151.

118. Restatement, *supra* note 110, § 208 cmt. c ("[I]t is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable.").

119. Dukeminier & Krier, *supra* note 64, at 439-40; *see* 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.26, at 478-80 (1990).

120. Farnsworth, *supra* note 119, § 4.26, at 480.

121. *Id.*

122. *Id.* at 478-79.

123. *Id.* at 479.

124. *Id.*

125. Examples include automobile purchase orders, credit card agreements, insurance policies, and most residential leases. *Id.*

126. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (upholding an adhesion contract absent strong evidence of fraud or duress); Bauer v. Aspen Highlands Skiing Corp., 788 F. Supp. 472, 474-75 (D. Colo. 1992) ("[P]rinted form contracts offered on a take it or leave it basis, alone, do not render the agreement an

There are cases, however, where standardized leases have been declared to be unconscionable, typically involving obscure clauses that shift responsibility away from the drafter. For example, in *Weaver v. American Oil Co.*,[127] the court held that a clause in a standardized lease, which shifted substantial pecuniary responsibility to the non-drafter, was unconscionable because "the clause was in fine print and contained no title heading."[128] Similarly, in *Henningsen v. Bloomfield Motors*,[129] the court struck a disclaimer clause from a standardized sales contract because the clause was in small print on the reverse side of the contract.[130]

To avoid unconscionable contract claims, public housing authorities utilizing consent clauses should emphasize the presence of such clauses to tenants before they sign leases. If there is little doubt that tenants are aware of such clauses, courts will feel less compelled to strike the consent clauses from leases.

It is also important to note that under both the Restatement and the U.C.C., unequal bargaining power alone, often associated with the use of standardized forms, will not render an agreement unconscionable. Comment d of Section 208 of the Restatement states, "A bargain is not unconscionable merely because the parties to it are unequal in bargaining position."[131] Similarly, the U.C.C. states, "The principle [of unconscionability] is one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."[132] Therefore, tenants cannot claim that the agreement is procedurally unconscionable merely because they are weaker financially.

Even without duress or procedural unconscionability in the bargaining process, a contract can still be unconscionable if the substance of the contract, or any clause therein, is shockingly unfair. Most cases involving substantive unconscionability involve an excessive *monetary* price or an unfair modification of a parties' remedies.[133] Neither circumstance is implicated by the consent clause. In addition, the fact that consent clauses involve surrender of a constitutional right is not a shocking circumstance. The Supreme Court has affirmed the view that a person can surrender constitutional rights by contract.[134]

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adhesion contract."); Preston v. Kruezer, 641 F. Supp. 1163, 1172 (N.D. Ill. 1986) ("[T]he mere fact that the clause is contained in a form agreement [does not] support a finding of unconscionability.").

127. 276 N.E.2d 144 (Ind. 1971).

128. *Id.* at 147.

129. 161 A.2d 69 (N.J. 1960).

130. *Id.* at 94-95.

131. Restatement, *supra* note 110, § 208 cmt. d.

132. U.C.C. § 2-302 cmt. 1.

133. White & Summers, *supra* note 115, at 155.

134. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (upholding the use of a forum selection clause printed on the back of a cruise ticket); *see also* Snepp v. United

Individuals may voluntarily contract away Fourth Amendment rights. The public housing lease containing a consent clause constitutes a voluntary consent under the Fourth Amendment because there is no duress in the bargaining process. In addition, the acceptance of form leases as a useful bargaining tool, along with an emphasis on the presence of the consent clause, indicates that the lease is not unconscionable. Accordingly, public housing leases containing consent clauses fall under the consent exception to the Fourth Amendment.

II. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

While public housing leases containing consent clauses fit under the consent exception to the Fourth Amendment, opponents of the clauses will argue that the doctrine of unconstitutional conditions bars their use. The doctrine of unconstitutional conditions posits that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may otherwise withhold the benefit altogether.[135] As applied to consent clauses in public housing leases, the unconstitutional conditions argument is that the government may not condition the receipt of government-run housing on the surrender of Fourth Amendment rights, even if it could withhold all federal housing assistance.

Although many benefits provided by the government have conditions attached, not all raise unconstitutional conditions problems. Unconstitutional conditions problems arise when the government provides a benefit that it is not compelled to provide, and offers that benefit on the condition that the recipient perform or forego an activity that is constitutionally protected.[136] Unconstitutional conditions problems do not arise when the government is obligated to provide a benefit, because in that instance, the government may not attach conditions to that benefit.[137] Because the Supreme Court has not recognized a constitutional right to housing,[138] the use of consent clauses merits scrutiny under the unconstitutional conditions doctrine.

The doctrine first developed during the *Lochner* era[139] to protect common-law rights in property and contract in response to the rise of

States, 444 U.S. 507 (1980) (surrendering First Amendment rights); Zap v. United States, 328 U.S. 624 (1946) (surrendering Fourth Amendment rights).

135. Sullivan, *supra* note 69, at 1415.

136. *Id.* at 1421-22.

137. *Id.* at 1423.

138. An effort to establish a fundamental interest in housing failed in Lindsey v. Normet, 405 U.S. 56 (1972). In sustaining a forcible eviction procedure after nonpayment of rent, the Court stated, "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." *Id.* at 74.

139. In the late 19th and early 20th centuries, the Supreme Court interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments as forbidding legislation that unduly restricted "freedom of contract" between private parties. *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down on due process grounds a New

a regulatory state.[140] In the earliest cases,[141] the Supreme Court held that while states could exclude a foreign corporation from local business or prohibit private carriers from using public highways, they could not condition such privileges on surrender of constitutional rights.[142] The doctrine fell into disuse as the New Deal emerged and the Court abandoned the *Lochner* application of economic substantive due process.[143] It reemerged under the Warren Court's application of substantive due process to protect individual rights to free speech, religion, association, and privacy.[144] The Court has applied the doctrine to hold that the government may not condition public unemployment benefits on acceptance of work on one's religious holiday,[145] tax exemptions or government jobs on political views,[146] or subsidies for public broadcasting on abstinence from editorializing.[147]

The Supreme Court, however, has not applied the doctrine to all cases in which a person is asked to give up a constitutional right to receive a benefit.[148] For example, while the Court has held that denial of unemployment compensation to Saturday sabbatarians unconstitu-

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York law that limited bakers' work days to eight hours). For a detailed discussion of the origin and development of the Lochner Era, see Gerald Gunther, Constitutional Law 444-53 (12th ed. 1991).

140. Cass R. Sunstein, The Partial Constitution 294 (1993).

141. Language concerning unconstitutional conditions appears as far back as 1876. *See, e.g.*, Doyle v. Continental Ins. Co., 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power . . . of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.").

142. Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926) (striking down a requirement that companies wishing to use public highways first had to apply for a permit); Terral v. Burke Constr. Co., 257 U.S. 529 (1922) (barring states from conditioning corporate privileges on surrender of access to federal courts); Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910) (striking down a requirement that companies wishing to use public highways first had to apply for a permit).

143. The decline of Lochnerism began with the decision in Nebbia v. New York, 291 U.S. 502 (1934), when the Court determined that a state was free "to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." *Id.* at 537. It was not until 1937, however, that the Court explicitly overruled Adkins v. Children's Hosp., 261 U.S. 525 (1923), one of the major *Lochner* era precedents. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling *Adkins* and upholding a state minimum wage law for women). *See also* Gunther, *supra* note 139, at 455-57 (discussing the decline of Lochnerism and the impact of *Nebbia* and *West Coast Hotel*).

144. *See* Sullivan, *supra* note 69, at 1416 ("Untouched by the falling rubble as the New Deal leveled and rebuilt the substantive priorities of constitutional liberty, the doctrine . . . reemerged under the Warren Court . . . .").

145. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Sherbert v. Verner, 374 U.S. 398 (1963).

146. Pickering v. Board of Educ., 391 U.S. 563 (1968); Speiser v. Randall, 357 U.S. 513 (1958).

147. FCC v. League of Women Voters, 468 U.S. 364 (1984).

148. *See* Lynn A. Baker, *The Prices of Rights: Toward A Positive Theory of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185, 1187 (1990); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 10-11 (1988); Sullivan, *supra* note 69, at 1416-17.

tionally infringes upon freedom of religion,[149] it also has held that refusal to grant food stamps to striking workers does not infringe upon freedom of speech or of association.[150] And while the Court has held that exempting magazines from state taxation based on subject matter unconstitutionally infringes upon speech,[151] it also has held that choosing to subsidize only medical expenses related to childbirth and not to abortion does not infringe upon fundamental reproductive rights.[152] The Court's inconsistency has led to a vigorous debate about the proper application of the doctrine.[153]

This part will present three primary views of the unconstitutional conditions doctrine—Holmesianism,[154] Defense of the Doctrine, and Abandonment—and conclude that the approach under the abandonment view is the appropriate analysis of unconstitutional conditions claims.

A. *Holmesianism*

The Holmesian view rejects the doctrine of unconstitutional conditions and argues that the government's greater power to create a program includes the lesser power to impose conditions on the benefits of the program. This view was held by Justice Oliver Wendell Holmes, whose most famous statement of his position can be found in *McAuliffe v. Mayor of New Bedford*.[155] There, Justice Holmes, responding to a police officer's claim that he was unfairly discharged for his political views, stated that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . . The servant cannot complain, as he takes the employment on the terms which are offered him."[156] Under this greater-power-includes-the-lesser-power approach, courts should almost never invalidate conditions attached to government benefits.

Today, Chief Justice William Rehnquist is the most prominent advocate of the Holmesian approach. In *Cleveland Board of Education v. Loudermill*,[157] the Cleveland Board of Education dismissed two em-

149. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Sherbert v. Verner, 374 U.S. 398 (1963).

150. Lyng v. International Union, 485 U.S. 360 (1988).

151. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

152. Rust v. Sullivan, 500 U.S. 173 (1991); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

153. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); Baker, *supra* note 148; Epstein, *supra* note 148; Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553 (1992); Sullivan, *supra* note 69; Sunstein, *supra* note 140.

154. *See* Sunstein, *supra* note 140, at 294.

155. 29 N.E. 517 (Mass. 1892).

156. *Id.* at 517-18.

157. 470 U.S. 532 (1985).

ployees.[158] The former employees challenged the propriety of administrative procedures on due process grounds, claiming that the Ohio statutes did not afford them an opportunity to respond to charges prior to their removal.[159] The Court held that the statutes provided sufficient due process, but because the employees claimed that they had no chance to respond to the charges leveled against them, the lower court had erred in dismissing their complaint.[160] Justice Rehnquist, in dissent, noted that the subjective and unpredictable interpretation of the Due Process Clause in these types of cases would result in a different decision in every case.[161] To avoid the varying interpretations, Justice Rehnquist, echoing Justice Holmes' statements almost one hundred years earlier, argued that the court should "hold that one who avails himself of government entitlements accepts the grants of tenure along with its inherent limitations."[162] Similarly, in *Posadas de Puerto Rico Associates v. Tourism Co.*,[163] Justice Rehnquist utilized the greater-power-includes-the-lesser-power approach in upholding a ban on casino advertising aimed at Puerto Rican residents.[164] Rehnquist rejected an argument that the ban violated the First Amendment: "In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[165]

Clearly, the result under this view is dramatic—the government always wins.[166] When citizens participate in a program to which they have no constitutional right, the Constitution places no constraints on the type and number of conditions the government imposes. The danger is that the size of the modern regulatory state transforms this greater-includes-the-lesser argument into a blank check for the government.[167] For this reason, despite its presence in recent opinions, the Holmesian approach has been widely criticized.[168]

B. *Defense of the Doctrine*

The second view seeks to preserve *Lochner*-like substantive due process rights in the face of threats posed by a modern regulatory government. Thus, this view supports the unconstitutional conditions

158. *Id.* at 535-37.
159. *Id.* at 536-37.
160. *Id.* at 547-48.
161. *Id.* at 563 (Rehnquist, J., dissenting).
162. *Id.*
163. 478 U.S. 328 (1986).
164. *Id.* at 348.
165. *Id.* at 345-46.
166. Sunstein, *supra* note 140, at 295.
167. Van Alstyne, *supra* note 153, at 1461-62.
168. *See* Sullivan, *supra* note 69, at 1417-18; Sunstein, *supra* note 140, at 296; *see also* Stuntz, *supra* note 153, at 566-67 nn. 50-52 (describing commentators' criticisms of the Holmesian view).

doctrine. One modern advocate of this view is Professor Richard Epstein.[169] Professor Epstein, fiercely protective of an individual's right to be free of interference by others in all economic and social decisions,[170] posits that a "presumption of distrust should attach to all government action."[171] Epstein construes the unconstitutional conditions doctrine as a valid mechanism to "take back" some of the power that the Supreme Court has conferred upon government officials.[172] As a result of this expansive regulatory authority, the government has become a monopolist in the areas of social and economic legislation.[173] Accordingly, the government "should be limited both in the concessions that it may exact from private [parties] and in the conditions it may impose on them."[174] On this point, Epstein defends the doctrine, but only as a second-best alternative to what would be a constitutional ideal—the outright prohibition of all government spending and taxing programs.[175]

Professor Kathleen Sullivan is another modern advocate of the doctrine,[176] although she rejects Epstein's approach because she believes that it does not go far enough to protect individuals' rights.[177] Instead, Professor Sullivan calls for a "vigorous defense" of the doctrine,[178] claiming that it needs to be applied more often.[179] She would subject to strict review[180] "any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty."[181] Unlike Epstein, however,

169. *See* Epstein, *supra* note 148.

170. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Cal. L. Rev. 431, 501 (1993).

171. Epstein, *supra* note 148, at 104.

172. Epstein contends that the doctrine would be unnecessary if the Court had restricted the scope of the government power in the first place. *Id.* at 28.

173. *Id.* at 22.

174. *Id.*

175. *Id.* at 28; *see also* Sunstein, *supra* note 140, at 297 (describing Epstein's view that the doctrine operates as a second-best substitute for the outright prohibition of spending and taxing programs); Sullivan, *supra* note 69, at 1418 (same).

176. Sullivan, *supra* note 69.

177. *Id.* at 1418.

178. *Id.*

179. *Id.*

180. Because most legislation involving fundamental rights imposes burdens on one classification of persons, most fundamental rights cases are examined under the standards used in equal protection cases. John E. Nowak & Ronald D. Rotunda, Constitutional Law 580 (4th ed. 1991). There are three standards of review utilized in equal protection cases: strict scrutiny, rational relationship, and intermediate scrutiny. *Id.* at 574-76. Under the strict scrutiny standard, the Court will only allow the legislation if the government shows a "compelling" interest in passing the legislation. *Id.* at 575. The intermediate scrutiny standard imposes a lighter burden on the government; it must show that the legislation has a substantial relationship to an important government interest. *Id.* at 576. Finally, under the rational relationship standard, which imposes almost no burden on the government, the legislation simply must have a rational relationship to any legitimate governmental interest. *Id.* at 580.

181. Sullivan, *supra* note 69, at 1499-1500.

Professor Sullivan recognizes that some governmental burdens may survive strict scrutiny and thus concludes that there may be instances when the government can constitutionally burden a preferred liberty.[182]

Because the unconstitutional conditions doctrine is based on *Lochner*-like principles "that have been roundly repudiated in the twentieth century,"[183] the doctrine is ill-suited to the modern regulatory state. The ever expanding view of the commerce clause and government spending power results in modern legislation that generally involves some type of government oversight or regulation.[184] Advocates of the doctrine would characterize almost every government spending decision as suspect and render many of them unconstitutional. For this reason, this use of the doctrine would be inappropriate in today's heavily regulated society.

C. *Abandonment*

The final view, articulated by Cass Sunstein, rejects the doctrine and urges its abandonment.[185] This approach is similar to the Holmesian view to the extent that it regards the doctrine as a creation of *Lochner*-era principles that are no longer useful under the modern system of government. This position recognizes that the principles underlying the doctrine are useful in alerting courts that a government spending decision may infringe on a constitutionally protected right, but argues that a formalist doctrine is not necessary to perform this function.[186] Rather than defining all government conditions as unconstitutional, this approach inquires into the nature of the interest affected by the government and the reasons offered by the government for its intrusion: Does the government have a legitimate justification for intruding upon a constitutionally protected interest?[187]

To determine whether an unconstitutional condition exists under this approach, the most important factor is the constitutional provision at issue.[188] Because each constitutional provision carries with it distinct rights and countervailing justifications, every case will yield a different result. The doctrine is flawed because it results in a blanket application to all conditional benefits, and it does not account for the individual constitutional provision and its corresponding rights and limitations. The cases reviewed below demonstrate the Supreme Court's ability to weigh the constitutional intrusion against the gov-

182. *Id.* at 1503. For example, Sullivan agrees with the outcome in Snepp v. United States, 444 U.S. 507 (1980), because there was compelling justification for pressuring Snepp's rights. *Id.*
183. Sunstein, *supra* note 140, at 298.
184. *See id.* at 297-98.
185. *Id.* at 291-318.
186. *Id.* at 305.
187. *Id.* at 292.
188. *Id.* at 306.

ernment's justifications for such intrusion without formally invoking the doctrine.

In *Snepp v. United States*,[189] the Supreme Court upheld the condition and refused to apply the doctrine. The Court permitted the use of a secrecy agreement between the government and an employee of the CIA even though the agreement unquestionably burdened the employee's First Amendment rights.[190] The employee's rights arguably were infringed upon because the agreement required any publication to be reviewed by the agency prior to distribution.[191] The Court reasoned, however, that an agent's publication of unreviewed material relating to CIA activities could be detrimental to national security.[192] Even though the government intruded upon a constitutional right, it had compelling justifications for such intrusion—protecting national security.

In *Hobbie v. Unemployment Appeals Commission of Florida*,[193] the Court struck down the condition, also without applying the doctrine. Here, a woman was fired from her job because she refused, for religious reasons, to work on the Sabbath.[194] The Florida Bureau of Unemployment Compensation denied her benefits on the ground that Hobbie's refusal to work constituted misconduct.[195] The Bureau's decision intruded upon Hobbie's First Amendment right of freedom of religion because it forced her to choose between following her religion or surrendering benefits.[196] After the Bureau conceded that there was no compelling interest that justified the refusal of benefits,[197] the Court reversed the lower court's decision to withhold benefits.[198]

Although the facts of *Snepp* and *Hobbie* differ, they both involve a similar problem—surrendering a constitutional right as a prerequisite to obtaining a governmental benefit. Despite the implications of unconstitutional conditions problems in each case, the Court did not utilize the doctrine. Instead, the Court merely examined the justification offered for the constitutional intrusion. In *Snepp*, the Court found

189. 444 U.S. 507 (1980) (per curiam). *See supra* text accompanying notes 71-75.

190. *Snepp*, 444 U.S. at 510.

191. Snepp argued that the agreement was unenforceable because it was a prior restraint on speech. *Snepp*, 444 U.S. at 509 n.3. Although there is a strong presumption against prior restraints, *see e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."), one court has upheld a prior restraint on speech when national security is involved. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (preventing a magazine from publishing an article containing technical information about the hydrogen bomb).

192. *Snepp*, 444 U.S. at 511-12.

193. 480 U.S. 136 (1987).

194. *Hobbie*, 480 U.S. at 138.

195. *Id.* at 138-39.

196. *Id.* at 140 (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

197. *Id.* at 141.

198. *Id.* at 146.

compelling justification for the intrusion, while in *Hobbie* it did not. Unlike Sullivan, who suggests strict scrutiny as a standard of review,[199] Sunstein's approach requires only a "legitimate justification" for intrusion upon a constitutional right.[200] Thus, the inquiry, as applied to consent clauses, is whether the government has a legitimate justification for using consent clauses to facilitate housing sweeps, a matter discussed in part III.

D. *The Future of the Doctrine*

In addition to *Posadas de Puerto Rico Associates v. Tourism Co.*,[201] discussed above,[202] two recent Supreme Court decisions indicate that use of the unconstitutional conditions doctrine will likely be abandoned in the future. In *Lyng v. International Union, UAW*[203] and *Rust v. Sullivan*,[204] the Court refused to apply the doctrine and upheld the challenged statutory provisions.[205]

Lyng involved a challenge to a 1981 amendment to the Food Stamp Act, which provided that food stamps would not be distributed to otherwise eligible workers who are on strike.[206] The union claimed that the amendment provision forced workers to sacrifice their First Amendment right of association to obtain food stamps.[207] The Court was faced with a classic unconstitutional conditions problem: Although Congress need not have provided food stamps at all, once it did, it could not discriminate between striking and non-striking workers. The Court refused to apply the doctrine and deferred to Congress to shape the eligibility requirements under the Food Stamp Program.[208] In so holding, the Court decided that the government's greater power to create the Food Stamp Program also included the lesser power to exclude striking workers from receiving such benefits.

Rust v. Sullivan[209] also rejects the doctrine of unconstitutional conditions. *Rust* extends previous cases where the Court held that the government need not provide assistance to women who choose to have an abortion.[210] *Rust* involved Title X of the Public Health Service Act, which provides federal funding for family-planning services.[211] The Act specifically provides that "[n]one of the funds

199. *See supra* note 180.
200. Sunstein, *supra* note 140, at 306.
201. 478 U.S. 328 (1986).
202. *See supra* text accompanying notes 163-65.
203. 485 U.S. 360 (1988).
204. 500 U.S. 173 (1991).
205. *Lyng*, 485 U.S. at 363-64; *Rust*, 500 U.S. at 203.
206. *Lyng*, 485 U.S. at 362-63.
207. *Id.* at 363-64.
208. *Id.* at 372-73.
209. *Rust*, 500 U.S. 173 (1991).
210. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).
211. *Rust*, 500 U.S. at 177-78.

appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[212]

The regulations promulgated under the Act prohibited any counselling concerning abortion or referrals of a pregnant woman to an abortion provider.[213] Several doctors and patients challenged the regulations, claiming that the regulations forced doctors to relinquish their constitutional right to freedom of speech—specifically the right to engage in abortion advocacy and counselling—to receive government benefits.[214] The petitioners also claimed that the regulations violated a woman's Fifth Amendment right to choose whether to terminate her pregnancy.[215] Once again, the Court employed a greater-power-includes-the-lesser-power argument and refused to find the regulations unconstitutional.[216]

The decisions in *Lyng*, *Rust*, and *Posadas* indicate that in the future, the Court may be hostile to unconstitutional conditions arguments.[217] It is arguable that this hostility may result in the further revival of the greater-power-includes-the-lesser-power argument.[218] In light of these decisions and the questionable future of the doctrine, Sunstein's argument that the doctrine is an anachronism is persuasive. Thus, rather than applying the doctrine to analyze unconstitutional conditions problems, it is preferable to balance the nature of the interest affected by the government and the reasons offered by the government for its intrusion.[219]

III. Application of the Sunstein Approach to Public Housing Consent Clauses

This part applies Sunstein's approach to the issue of consent clauses in public housing leases. Under Sunstein's approach, there is a two-pronged analysis. First, the court must inquire into the constitutional provision at issue and the interest it protects. Second, provided that there is an intrusion upon such interest, the court must examine the reasons offered by the government for such intrusion. Critics may

212. *Id.* at 178 (citation omitted).
213. *Id.* at 179.
214. *Id.* at 196.
215. *Id.* at 201.
216. *Id.* at 190-203.
217. *See* Laurence H. Tribe, American Constitutional Law § 10-8, at 681 n.29 (2d ed. 1988) ("A few recent Supreme Court decisions have cast doubt on the continued validity of the doctrine.").
218. *Id.*; Stuntz, *supra* note 153, at 567 n.51.
219. When fundamental rights are implicated, legislative action is subject to "strict scrutiny," which can only be overcome by compelling justifications. *See supra* note 180. *But cf.* FCC v. League of Women Voters, 468 U.S. 364, 407 (1984) (Rehnquist, J., joined by Burger, C.J. and White, J., dissenting) (supporting proposition that constitutional rights are sufficiently protected any time a "rational relationship" exists between the condition imposed and Congress' purpose in providing a government benefit).

contend that the use of consent clauses represents an intrusion upon tenants' Fourth Amendment rights. An analysis of the interests protected by the Fourth Amendment, weighed against the justifications for intrusion, however, show that the use of consent clauses is constitutionally permissible.

A. *The Fourth Amendment*

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[220]

The Amendment was a direct response to the abuses suffered by the colonists at the hands of ruling British officers.[221] In an effort to prevent the American colonies from trading with non-English industry, the British government enacted various trade restrictions.[222] The most vile restrictions were called writs of assistance.[223] These general warrants, issued without probable cause, particularity, or prior judicial approval, empowered officials to invade citizens' homes at will and ransack the premises to search for evidence of crimes—particularly evidence of illegally imported goods.[224] The abuse in the writs lay not only in the generality of their scope and virtually unlimited power to search anyone at anytime, but that there was no return requirement after search and seizure.[225] In addition, once issued, writs survived six months past the death of the issuing sovereign.[226] It was this history of wholesale and indiscriminate searches for evidence of criminal activity that led the Framers to create the Fourth Amendment.[227]

The Fourth Amendment serves as a constitutional protection against the "long reach of government"[228] and embodies a deeply-held belief that "to value the privacy of home and person . . . is . . . to value human dignity."[229] The protections afforded by the Fourth Amendment are inherent in the requirements that consent be volun-

220. U.S. Const. amend. IV.
221. Jacob W. Landynski, Search and Seizure and the Supreme Court 20 (1966).
222. *Id.* at 30; Hall, *supra* note 15, § 1:3, at 6.
223. Landynski, *supra* note 221, at 30-31.
224. Hall, *supra* note 15, § 1:3, at 6; Landynski, *supra* note 221, at 31.
225. Hall, *supra* note 15, § 1:3, at 6.
226. *Id.*
227. Payton v. New York, 445 U.S. 573, 583 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment.").
228. Landynski, *supra* note 221, at 47.
229. *Id.*

tary and the resulting search reasonable.[230] This Note argues that consent obtained by a consent clause is voluntary. The reasonableness of a search, however, cannot be determined until the search is conducted.[231] Provided that both elements are present, the government has not intruded upon any fundamental interests.

B. *Justifying the Use of Housing Sweeps*

Assuming arguendo that consent clauses represent an intrusion upon public housing tenants' Fourth Amendment rights, the severity of conditions that exist in public housing projects provide compelling justification to allow sweeps based on consent clauses. The following discussion explores some of the government's reasons to use consent clauses as a means to restore order to large urban public housing projects.

1. Protect Health, Safety, and Welfare of Residents[232]

The government of the United States was created to "establish Justice, insure domestic Tranquility . . . [and] promote the general Welfare"[233] of its citizens. In addition, under the Housing Act of 1949, the government established the national housing policy of "a decent home and a suitable living environment for every American family."[234] As indicated by tenants' horror stories, myriad legislation, and available statistics, the government has failed miserably in attempting to achieve these goals in public housing.

When the drug problem exploded in the United States during the 1980s and severely afflicted public housing developments, the government responded to this crisis. Congress passed the Public Housing Drug Elimination Act[235] as part of the Anti-Drug Abuse Act of 1988.[236] In this legislation, Congress recognized that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs."[237] Public housing sweeps, similar to those conducted in Chi-

230. All searches conducted under the Fourth Amendment carry with them a requirement of reasonableness. Hall, *supra* note 15, § 1:19, at 27-29; *see* Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

231. United States v. Jacobsen, 466 U.S. 109, 115 (1984) ("The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred.").

232. *See* Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 341 (1986) ("We have no difficulty in concluding that the [legislature's] interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest.").

233. U.S. Const. pmbl.

234. Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413, 413 (1949).

235. Pub. L. No. 100-690, § 5122, 102 Stat. 4301, 4301-03 (1988) (codified as amended at 42 U.S.C. §§ 11901-11925 (Supp. V 1993)).

236. Pub. L. No. 100-690, § 5101, 102 Stat. 4181 (1988) (codified at 21 U.S.C. §§ 1501-1509 (1988)).

237. 42 U.S.C. § 11901(1) (Supp. V 1993).

cago, are an attempt to achieve goals espoused as far back as the Framers and as recently as President Clinton's promise to provide safe housing for public housing tenants.

2. Maintain Safe and Sanitary Conditions Inside Housing Units

Public housing developments are not only plagued by crime, but also a deterioration of physical conditions within the units.[238] When public housing officials inspect units during sweeps, they examine all structural elements to ensure that the public housing authority is complying with HUD regulations and to identify and address all maintenance problems in the unit.[239] The public housing authorities have a strong incentive to ensure that the physical condition of the units is properly maintained because physical deterioration diminishes residents' quality of life. In addition, those units that are in the worst shape are often abandoned.[240] These vacant units are frequently used for illegal activity, and the presence of non-residents reduces safety in the community.[241]

3. Ensure Proper Residency

Another goal of the sweeps is to ensure that only authorized residents are living in the units. Trespassers and unauthorized residents are often responsible for crime committed in public housing. Again, any effort to reduce the number of non-residents will increase safety in the community. In addition, with periodic sweeps, public housing authorities can ensure that they are receiving the correct rent. Because rents are based on tenants' income, some tenants may not report additional family members whose income would increase the amount of rent paid. Collecting the proper rent is important because rental revenues are used for other programs aimed at enhancing community life.

4. Maintaining a Sense of Community

Sweeps alone cannot solve the problems that exist in public housing. Only the residents can cure the ills by forming a community and creating a livable environment. Unfortunately, many residents are afraid to leave their apartments, thereby frustrating even the boldest attempts at community empowerment. Any efforts to improve public housing are likely to fail unless crime is tackled first. The sweeps indicate to residents that the public housing authority is willing to take the first step in creating a community. Only through a reduction in crime will other social problems of public housing be remedied. Sweeps are

238. *The Final Report, supra* note 6, at 78-80.
239. *See* supra note 10.
240. *The Final Report, supra* note 6, at 63.
241. *Id.*

an important tool to control crime and return a sense of community to ravaged public housing projects.

CONCLUSION

This Note argues that the government may require public housing tenants to consent to searches as a condition of receiving such housing. Such consent may be obtained through the insertion of a consent clause into public housing leases. The use of such clauses survives constitutional scrutiny and fulfills the requirements of an enforceable bargain.

Although the Fourth Amendment is one of the most important rights that individuals possess, nothing bars these same individuals from surrendering its protection. The only requirement is that such abdication is voluntary. The signing of a public housing lease with a consent clause meets the voluntariness requirement of the Fourth Amendment because the agreement is not the product of duress. In addition, the compelling justifications for allowing the sweeps outweigh the benefits of Fourth Amendment protection.

Consent clauses are important because they facilitate the use of housing sweeps. Housing sweeps are a drastic response to a crime problem that is, at times, out of control. Admittedly, the problems within the nation's public housing developments are beyond anything that sweeps, alone, can cure. Conceding that sweeps are only a partial solution, however, does not render the argument for their use invalid. It is a recognition that only the members of a community, working in unison, will cure the social ills that exist in public housing. But when the residents are too fearful to come out of their apartments to *become* a community, community empowerment is impossible, and the problems will continue to exist. The sweeps are an effective way to prove to the residents of public housing that the government is making an effort to develop such a community, so that the goal of a decent home and suitable living environment for every American family will be fulfilled.